

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
SOAH DOCKET NO. 582407-2674  
TCEQ DOCKET NO. 2007-0362-IHW

APPLICATION OF TEXCOM GULF  
DISPOSAL, L.L.C. FOR TEXAS  
COMMISSION ENVIRONMENTAL  
QUALITY COMMISSION  
INDUSTRIAL SOLID WASTE PERMIT  
NO. 87758

2008 MAY 15 AM 9:52  
§ BEFORE THE STATE OFFICE  
§ CHIEF CLERKS OFFICE  
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§ OF  
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§  
§ ADMINISTRATIVE HEARINGS

**INDIVIDUAL PROTESTANTS' EXCEPTIONS TO THE ADMINISTRATIVE  
LAW JUDGES' PROPOSAL FOR DECISION**

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, Individual Protestants (hereinafter "IP" or "Individual Protestants") and files these Exceptions to the Administrative Law Judges' Proposal for Decision in the above referenced matter and would show the Commission the following:

**I. Exceptions to PFD**

The IP files these exceptions to the PFD urging the Commission to deny Texcom Gulf Disposal LLC's ("Applicant") application for a solid waste permit ("permit") or alternatively, to remand it to the State Office of Administrative Hearings ("SOAH") for further proceedings for the following reasons:

1. The complete lack of regulatory rules regarding the construction and operation of the surface facility subject of the solid waste permit creates an immediate hazard to the public, and fails to protect the interests of the public in the immediate area, as well as the citizens of the State of Texas;

2. The Administrative Law Judges ("ALJ") fail to address public interest requirements required by statute and *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas and Pioneer Exploration*, No. 03-07-00025-CV (December 2007). The PFD mentions several public interest issues mentioned by the IP at pages 18-19, but summarily dismisses them without addressing TexCom's burden of proof or any evidence supporting TexCom's position;
3. The application fails to ensure the safety of the facility in the event of stormwater runoff;
4. Operation of the surface facility will create a nuisance, and the Applicant has failed to meet its burden of proof in regards to showing the absence of any potential nuisance created by the subject facility.

#### **1. Lack of Regulatory Rules**

The ALJ makes the comment that "[i]ntervenors are correct that no specific set of solid-waste rules expressly addresses a surface facility at an underground injection well site for nonhazardous industrial wastewater." See PFD at 8. However, the ALJ go on to suggest that the issue is not controlling as other general rules provided by the ED and/or Applicant adequately apply to the subject permit.

The IP strongly disagree with this conclusion. As the ALJ admit, there is simply no clear rules covering the operation of these facilities. Mr. Graeber, P.E., the engineer offering testimony on behalf of the ED, admitted there were no rules, and that he had nothing to look at to ensure the proposed design of the surface facility complied with any rules.

The ALJ concludes that even if there is an issue, that it would require a rule-making proceeding to address it, which is outside the scope of the contested case hearing. See PFD at 8. It only seems logical that one cannot toss aside the protection of the environment and the public at large because a rule making procedure is outside the scope of the contested case hearing. How can TCEQ ensure that Applicant complies with the rules when none exist? The IP would argue that allowing a facility be installed without an adequate set of rules to govern the construction and operation of the facility flies in the face of not only logic, but also of the very mission statement of the TCEQ.

## **2. Public Interest Requirements**

It is clear that the law is in a state of flux with regards to what public interest requirements must be considered in regards to facilities such as the one proposed by the Applicant. See generally *Texas Citizens for a Safe Future and Clean Water v. Railroad Commission of Texas and Pioneer Exploration*, No. 03-07-00025-CV (December 2007).

Evidence was presented as to each of the following:

1. There were multiple sources of potential odors emanating from the surface facility and diesel trucks utilizing the facility;
2. No studies with regards to traffic safety had been performed based upon the hundreds of trucks that Applicant proposes to open its facility to for waste disposal;
3. There were no plans to deal with traffic that arrives at the facility before and/or after the facility is open for business on any given day (and the potential for having trucks parking on the side of FM 3083 is a distinct possibility);

4. Potential noise from ongoing operations and construction were a concern for residents to which Applicant failed to address with any competent contravening evidence;
5. Applicant's entire case with regards to affects on traffic flow came from one last minute "expert" witness that viewed the proposed facility for an hour or two on a Saturday.

Furthermore, the IP attempted to offer evidence of potential damages related to property values, but the ALJ excluded such evidence on the basis that it was not related to a public interest requirement.

As the Applicant has failed to meet its burden with regards to these public interest requirements, the IP urge that the permit be denied. Alternatively, this matter should be remanded to SOAH for a more complete and detailed analysis of the public interest requirements, including traffic, traffic safety, odor, noise and property values.

### **3. Stormwater Runoff**

The surface facility plans are completely devoid of specific details on the types and locations of piping and materials used. TexCom's evidence and application do not identify if pipes are above ground or below, if they are steel or plastic. As they have admitted, no compatibility testing has been performed on any materials with any chemicals. Therefore, it has to be assumed that a significant risk of above ground contamination will exist. When rain water accumulates, the end location of the rain water is of vital importance. Furthermore, Mr. Carl Brassow testified that in heavy weather, the tanks will be emptied. In stormy weather, with high winds, emptying the tanks is obviously more dangerous than leaving the tanks full, since empty tanks will be more susceptible to wind damage and subsequent contamination.

The application identifies a 2 foot high concrete beam whose dimensions are calculated using standard tank sizes to contain a 12 inch rainstorm. Mr. Brassow testified that the tanks were to be 1 story high; however, the evidence indicates tanks of 2-3 stories tall. Therefore, the beam area of 2 feet is too small, as it has not been adjusted for 2 and 3 story tanks (instead calculated using a 1 one story tank).

As such, the IP urge that the application should be denied, or in the alternative, the matter should be remanded to SOAH for a more detailed analysis of the application in terms of dealing with potential storm water runoff safety issues.

#### **4. Nuisance**

The PFD admits that the Applicant did not directly address nuisance issues in its closing, and that potential sources of nuisances existed. However, the PFD suggests that the Applicant met its burden of proof with the following evidence:

1. Mr. Brassow's testimony that, in his experience, wastewater facilities of this type generate little or no water.
2. That while it is common knowledge that trucks create noise, there is no evidence that they will create levels of noise to create a nuisance.
3. That by requiring the entrance be moved from one side of the facility to another, noise will be abated.

See PFD at 26-27.

None of this "evidence" comes close to complying with the burden of proof that lies with the Applicant. The PFD suggests that the IP and other Protestants have the burden of showing that a nuisance would be created; quite to the contrary, the IP urges that it is the Applicant that

has the burden of showing that no such nuisance will occur. Clearly, this burden has not been met. As such, the IP urges the TCEQ to deny this permit, or in the alternative, remand the matter to SOAH for a more detailed analysis of the nuisance issues.

## **II. Specific Exceptions to Findings of Fact and Conclusions of Law**

The IP specifically excepts to the following Findings of Fact and Conclusions of Law:

### Finding of Fact 44

See "4.Nuisance" above.

### Finding of Fact 57

The IP urge that there is inadequate evidence in the record to support this finding. The finding that the piping and systems used to transfer materials are appropriate when Applicant cannot identify the types of materials that are to be injected is inconsistent. Further, with a lack of regulatory rules regarding the surface facility, it is not possible to conclude that the operational parameters are adequate.

### Findings of Fact 74 - 83

The IP except to these findings in that the evidence presented suggested that to utilize a system set forth in these findings would be time consuming and could potentially render the process non-profitable. The PFD essentially puts forth a complete testing procedure to be performed on every tanker that enters the facility; the evidence does not suggest that this is commercially viable or that employees will be staffed with adequate training and education to carry out these testing procedures.

### Findings of Fact 87

The IP except to this finding in that it fails to address any procedures for trucks to go through security, the type of security utilized and the personnel manning the security.

#### Finding of Fact 96

The IP except to this finding of fact as Applicant has not met its burden of showing that there will not be contamination or imminent threat of contamination of soils or water resources.

#### Conclusion of Law 5

The IP except to this conclusion of law as it is inconsistent with earlier findings in the PFD; namely, the ALJ admitted a lack of regulatory rules directly related to solid waste facilities injecting Class I non-hazardous waste. Therefore, it is inconsistent to find as a matter of law that the rules of the TCEQ have been complied with when no such rules exist. Further, there is inadequate evidence in the record to support this conclusion of law.

#### Conclusion of Law 6

The IP except to this conclusion as there is insufficient evidence in the record to support this conclusion.

#### Conclusion of Law 8

The IP except to this conclusion as evidence was presented as to potential hazards to the public health and the environment, including but not limited to contamination (resulting from lack of containment) and truck and operational noise and odors.

#### Conclusion of Law 15

The lack of regulatory rules suggests it is impossible to have any draft permit or final permit contain appropriate conditions to assure compliance with all applicable statutory requirements. Further, there was insufficient evidence presented at the contested case hearing to support this conclusion.

#### Conclusion of Law 16

The IP except to this conclusion as evidence was presented that the operations of the

surface facility, in the event of a flood or loss of containment, would result in the contamination of a nearby water supplies, both private residential wells and feeders for larger bodies of water supplying large segments of the local populations.

#### Conclusion of Law 17

The IP except to this to conclusion of law as it fails to consider any evidence that was presented regarding multiple sources of odor release from the facility, the odors from hundreds of diesel powered commercial vehicles that would use the facility, traffic problems and traffic safety issues. Evidence of nuisance were presented an no competent contravening evidence was presented by Applicant.

#### Conclusion of Law 18

The IP except to this conclusion of law for the reasons stated in exceptions to Conclusion of Law 16 and 17, above.

#### Conclusion of Law 19

The IP except to this conclusion of law in that the lack of regulatory rules, as noted by the ALJ, makes it unclear as to what applicable statutory and regulatory requirements are being complied with. This finding is inconsistent with other findings, and is not supported by evidence in the record.

#### Conclusion of Law 20

For the reasons stated above, and based upon a lack of evidence in the record to support Applicant's burden of proof, the IP except to this conclusion.

### **III. Conclusion**

The ALJ have recommended that the Commission completely disregard extensive evidence presented with regards to the potential dangers associated with the operations of a



surface facility as proposed by Applicant. Within this suggestion to disregard, the ALJ admit the lack of regulatory rules regarding the operation of such facilities but still find that the operation of the facility complies with rules and regulations. The fact is that one cannot find that rules and regulations are being complied with and at the same time admit no such specific rules and regulations exist.

Further, the developing law clearly illustrates that a much greater burden is placed upon Applicant with regards to public interest issues than has previously been suggested or enforced. Applicant has clearly failed to meet its burden in this regard as no competent evidence was presented to counter concerns regarding traffic, traffic safety, noise, odors and damages to property values.

WHEREFORE, PREMISES CONSIDERED, the Individual Protestants respectfully request that their Exceptions to the PFD be granted, that the Commission order Industrial Solid Waste Permit No. 87758 be denied, and further request such other relief at law or equity to which the Individual Protestants may be entitled.

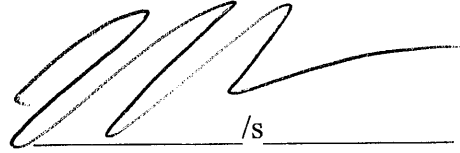
Respectfully Submitted,

By: 

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Certificate of Service

I certify that a copy of this pleading has been forwarded to persons of record in the master service list, in addition to the Honorable Administrative Law Judges, on this 15<sup>th</sup> day of May 2008.

  
\_\_\_\_\_/s  
Kevin A. Forsberg

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